

B-296317, Antmarin Inc.; Georgios P. Tzanakos; Domar S.r.l., July 26, 2005



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Decision

Matter of: Antmarin Inc.; Georgios P. Tzanakos; Domar S.r.l.

File: B-296317

Date: July 26, 2005

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Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly exercised option is denied where agency reasonably determined that exercising the option was the most advantageous means of satisfying the agency's needs.

DECISION

Antmarin, Inc., Georgios P. Tzanakos, and Domar S.r.l. protest the Department of the Navy's decision to exercise an option (specifically, option year 6) under contract No. N68171-99-D-4029, awarded to MLS-Multinational Logistic Services, Ltd.^[1] for the provision of husbanding services to the U.S. Navy, Coast Guard, Military Sealift Command, and Naval Fleet Auxiliary Force vessels in over 40 ports throughout the Mediterranean. The protesters argue that the Navy's exercise of the option failed to comply with regulatory requirements, the decision was arbitrary, and that it was the result of the agency's lack of advance planning.^[2]

We deny the protest.

BACKGROUND

On January 13, 1999, the Navy awarded a requirements contract to MLS for "husbanding" services in over 40 ports throughout the Mediterranean. MLS's contract was awarded at a total evaluated price of approximately \$234.6 million, for a base year from April 1, 1999 through March 31, 2000, plus nine 1-year options.

As explained by the parties, U.S. Navy ships visiting ports (at which the Navy does not maintain a base) frequently require and obtain husbanding services and supplies from contractors. These services and supplies generally include trash and sewage removal, refueling arrangements, force protection for ships, transportation for ship members, as well as the provision of fresh food and water. Historically, husbanding services in the

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Mediterranean region had been awarded under 36 port-specific contracts. In early 1998, however, the Navy issued a single solicitation for regional husbanding services throughout the Mediterranean, including the Gulf of Aqaba for Israeli and Jordanian ports, the Sea of Marmara, the Azores Islands, the Canary Islands, Madeira, Portugal, as well as France, Monte Carlo, Greece, Italy, Spain, Turkey, Libya, Lebanon, Morocco, Syria, Tunisia, Gibraltar, Albania, and Algeria. The Navy awarded the subject contract to MLS as a result of this solicitation.

Eight firms competed for the Mediterranean regional contract. MLS,^[3] however, was the only contractor to submit a proposal for all countries and all ports (MLS submitted its proposal on an "all or none" basis)--the other offerors submitted proposals for only portions of the requirement, limited to particular ports or countries. Overall, MLS's total price (\$234.6 million) was substantially lower than the lowest composite price of the other firms' proposals (\$412 million), a difference of approximately \$177 million. Agency Report (AR), Tab 6, Determination Not to Exercise Option Year Seven, at 1.

Under its contract, MLS is required to provide, among other services, force protection for the ships, trash and sewage disposal, replenishment of water and food, arranging for pilots, tugs, and line handlers, providing water taxi services, and other supplies or services as needed. At specified ports, MLS is also required to provide unique port services, including, for example, air terminal services for military aircrafts, and in support of operations other than war (e.g., emergency situations caused by natural disaster, terrorism, etc.), MLS is required to fulfill logistical requirements including, for example, providing liaisons with local political and police authorities. AR at 1-2.

The husbanding requirements are set forth in a "Schedule of Supplies/Services and Prices," which provides for numerous fixed-price and unpriced contract line items. Contract, attach. 3. As a general matter, where a requirement has not been priced, MLS is required to assist the Navy in contracting, from at least three reliable sources. Contract, attach. 5, B.4. As to the purchase of fresh fruit and vegetables (FFV), which were not priced, MLS is required to solicit three sources and provide the information to the Navy only for purchases in excess of \$10,000. Id. Moreover, MLS provides force protection--the Navy added this requirement to the contract on an unpriced basis following the events of September 11, 2001, on a sole-source basis. AR, Tab 6, Determination Not to Exercise Option Year Seven, at 3.

So far, the agency has exercised six of the nine options under the contract. It is the exercise of the sixth option, covering the period April 1, 2005 through March 31, 2006, that is at issue in this protest. In accordance with the terms of the contract, the Navy provided MLS with preliminary notification of its intent to exercise the option on November 12, 2004, more than 60 days before expiration of the contract.^[4] On March 22, 2005, the Navy formally exercised option 6 through a modification to MLS's contract. The decision to exercise the option was based on the contracting officer's determination, pursuant to FAR sect. 17.207, that exercise of the option was "the most advantageous method of fulfilling the Government's need, price and other factors . . . considered." AR, Tab 7, Determination to Exercise Option Year Six; Tab 8, Contract Mod. 32. Prior to the exercise of option 6, however, on March 15, the Navy decided not to exercise option 7 for the period April 1, 2006 through March 31, 2007.

Discussion

Before an option can be exercised, an agency must make a determination that exercise of the option is the most advantageous method of fulfilling its needs, price and other factors considered. FAR sect. 17.207(c)(3). This determination must be based on one of the following findings: (1) a new solicitation fails to produce a better price or a more advantageous offer; (2) an informal market survey or price analysis indicates that the option price is lower or the more advantageous offer; or (3) the time between contract award and option exercise is short enough and the market stable enough that the option price is the lowest price obtainable or the more advantageous offer. FAR sect. 17.207(d). With regard to the consideration of "other factors," under FAR sect. 17.207(c)(3), the contracting officer should take into account the need for continuity of operations as well as the potential costs of disrupting operations. FAR sect. 17.207(e). The contracting officer is

accorded broad discretion in making this determination, and our Office will therefore not question the decision to exercise an option, rather than conduct a new procurement, unless it is shown to be unreasonable or contrary to applicable regulations. Sippican, Inc., B-257047.2, Nov. 13, 1995, 95-2 CPD para. 220 at 2.

We find no basis to question the agency's exercise of option 6. The record reflects that the contracting officer based her decision to exercise option 6 on an "informal analysis of prices or an examination of the market." AR, Tab 7, Determination to Exercise Option Year Six. More specifically, the Navy considered the fact that during the initial competition, MLS's price (to include options) was 43 percent lower than the best composite pricing drawn from the other offerors, that MLS's escalation in prices from option year 5 to for option year 6 was close in line with that of other offerors in the original competition, and that MLS's escalation in price from the base year to option year 6 was less than that of other offerors in the original competition.[5] Agency's Response to Protesters' Comments at 7.

In addition, the Navy compared MLS's escalation rate for option 6 with the 2004 average rate of inflation for each country under the contract. In comparing these rates, the Navy noted that MLS's average percentage rate increase for all countries was 1.66 percent higher than the average of the inflation rates for all countries under the contract. Considering only the countries actually visited in the past year, MLS's average price increase was 2.14 percent higher than the average inflation rates for those countries. However, the agency also noted that MLS's average rate increase for the countries visited the most under the contract in the prior year was 2.09 percent lower than the average increase in the rate of inflation for these countries.[6] The contracting officer also considered that MLS's prices for sewage and trash removal services in Naples, Italy are approximately [deleted] percent lower than those of a separate Navy contract in Gaeta, Italy, and that from option year 4 through the end of option year 5, MLS was highly rated for past performance in many respects and either stable or better in virtually all categories. AR, Tab 7, Determination to Exercise Option Year Six.

Aside from price and performance considerations, in deciding to exercise option 6, the Navy highlighted the fact that the process of resoliciting and awarding a new contract would take more than 12 months,[7] and that the Navy requires the husbanding services under MLS's contract, which, in the past year supported 356 ships in 633 port visits, in 52 ports and 13 countries, on a continuous basis without interruption. AR at 6; Tab 7, Determination to Exercise Option Year Six. This was a significant concern for the agency because, as explained by the Navy, many of the ships visiting ports were replenishing supplies as they moved to and from the Persian Gulf carrying critical war material in direct support of Operation Freedom, and other ships required port visits in order to execute their daily missions of regional counter-terrorism and participation in NATO and other joint exercises. AR at 4.

In challenging the agency's determination to exercise option 6, the protesters principally rely on the agency's determination not to exercise option 7 under MLS's contract, which was signed several days prior to the determination to exercise option 6. As part of the determination not to exercise option 7, the contracting officer indicates that she is unable to make a determination that exercise of option 7 is the most advantageous method of fulfilling the government's need, "price and other factors considered," and includes a request for authority "to commence the planning for competition of the husbanding services requirements currently provided under the MLS contract." The determination also includes a tentative schedule for a 12-month acquisition process, which includes development of a new solicitation, issuance of the solicitation, receipt and evaluation of proposals, and award of a new contract. AR, Tab 6, Determination Not to Exercise Option Year Seven, at 5. As support for its determination and request to proceed with planning for a new solicitation, the contracting officer identified a variety of factors.

Specifically, the contracting officer noted that when the Navy awarded MLS's contract, the political and economic situation in Europe was different. According to the contracting officer, integration of businesses across borders has increased as has the formation of transnational alliances for services, which had previously been carried out on the domestic level by national firms, supporting the notion that there may be more companies willing to

compete for the entire scope of work. AR, Tab 6, Determination Not to Exercise Option Year Seven, at 2. A variety of other factors were also identified, to include: (1) the fact that the contract had been subject to 16 major modifications, such as the inclusion of force protection services; (2) reduced ship volumes; (3) reduction in the value of the dollar versus the euro since fiscal year 2002 and exchange rate problems under the current contract; (4) a desire to obtain fixed prices for some force protection items, which are currently provided by MLS on a sole-source basis without fixed prices; (5) a desire to obtain fixed prices for many other unpriced items since they represent approximately 21 percent of the total amount spent in all ports and the Navy believes it can now price these items, based on historical pricing information under the contract; (6) development of a procedure to better provide for competition of FFV purchases, or, in the alternative removing the FFV requirement from the contract and obtaining them by alternate means; and (7) the need to tailor requirements as a result of a recent request to include new ship requirements from the Military Sealift Command under the husbanding contract. Id.

Given the Navy's determination not to exercise option 7, the protesters assert that the determination in favor of exercising option 6, made days later, was a "completely arbitrary concoction apparently issued in order to justify an extension caused by the Navy's failure to test the market in a timely fashion." Protesters' Comments at 16. The two determinations, however, are not wholly at odds as argued by the protester. Rather, as the Navy argues, they reflect the contracting officer's reasonable effort to address a difficult acquisition planning problem--the need to obtain necessary services on an uninterrupted basis from a quality contractor, while also justifying and planning for a follow-on acquisition, which requires the length of one option period for completion. Given these circumstances, it was reasonable for the Navy to conclude on the one hand that exercise of option 7 was not in the best interest of the government since it was due to be exercised more than 12 months from the date of the determination, and on the other hand to conclude that exercise of option 6 was in the best interest of the government, given the Navy's legitimate need for continuity of services, as well as the Navy's determination that MLS's prices were in line with market prices and that it had a positive record of past performance. While this analysis may not have placed maximization of price competition for the option 6 requirements as a top priority, as may have been the case in the agency's decision to issue a new solicitation instead of exercising option year 7, maximizing price competition is not required in the exercise of an option. Rather, the determination whether to exercise an option requires a balancing of many factors and it is this balancing and weighing of factors which characterizes the discretion afforded agencies in this area.

In arguing that the agency's exercise of option 6 was the result of the Navy's lack of advance planning, the protesters maintain that the Navy should have evaluated whether to exercise option 6 approximately 1 year before the option exercise date, just as it had done with option 7. The logic of this argument, however, falls under its own weight. Had the Navy, as the protesters suggest, analyzed the exercise of option 6 a year earlier, and made a determination not to exercise the option, the determination to exercise option 5 also would have been improper under the theory advanced by the protesters, unless the option 5 determination had also been made a year in advance. Following the protesters' argument to its logical conclusion, the Navy would have had to decide whether to exercise the first option at the moment of contract award, a clearly unreasonable circumstance.

Moreover, the decisions cited by the protesters as support for their assertion that the Navy's exercise of option 6 violated "well-established law" requiring reasonable advance planning, are inapposite. All of the cases cited by the protesters in this regard involve situations where agencies, owing to their lack of advance planning, awarded contracts using noncompetitive procedures, e.g., sole-source awards under FAR Part 6. See, e.g., VSE Corp., Johnson Controls World Servs., Inc., B-290452.3, et al., May 23, 2005, 2005 CPD para. 103 at ____; Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD para. 168 at 9. We sustained those protests, citing the requirements of the Competition in Contracting Act (CICA) of 1984, 41 U.S.C. sect. 253(f)(5)(A), which expressly provides that under no circumstance may noncompetitive procedures be used due to a lack of advanced planning by contracting officials.

In this case, the agency did not utilize noncompetitive procedures; rather, the Navy

exercised an option, which had been evaluated as part of the initial competition and thus satisfied the requirement for full and open competition.[8] In such a situation, the determination to exercise the option simply does not require the same degree or kind of advance acquisition planning required to meet the competition mandates of CICA for the award of a new contract, and thus the decisions relied upon by the protesters do not apply.

The protesters also challenge the adequacy of the Navy's price analysis, arguing that it was unreasonable for the Navy to compare MLS's prices with those of the original competition because these prices are no longer valid due to the passage of time and changes in the market conditions, as acknowledged by the agency in its decision not to exercise option 7.[9] The Navy did compare MLS's prices with those of the original competition and reasonably focused on the fact that MLS's price was approximately 43 percent lower than the other offerors' (a significant difference), and that MLS's escalation for its option year pricing was in line with the increases of the other offerors (demonstrating that MLS's did not offer overly inflated option year pricing in the original competition). Contrary to the protesters' suggestions, the Navy did not rely exclusively on a comparison of the prices from the original competition.

Rather, the Navy compared MLS's rate of increase for its option pricing with the current inflation rates for the countries visited and concluded that they were actually lower when compared with the average rate of inflation for the countries most visited. While the protesters maintain that the countries' average inflation rates do not provide a valid basis of comparison because they are more general, and therefore are not a good indicator of the increase or decrease in prices for the particular products and services under MLS's contract, the protesters fail to present any specific evidence suggesting that MLS's prices are actually higher than those found in the market. In addition, as noted above, the Navy specifically compared MLS's prices for sewage and trash removal services in Naples, Italy with those of another Navy contract in Gaeta, Italy, and found MLS's prices to be lower.[10] As explained by the Navy, it compared prices for these particular services because they are expensive, the locations are comparable, and the prices were documented and valid. Agency's Response to Protesters' Comments at 4 n.2. Given the agency's wide discretion in this area, there was nothing unreasonable with the agency's price analysis. See Alice Roofing & Sheet Metal Works, Inc., B-283153, Oct. 13, 1999, 99-2 CPD para. 70 (agency's use of consumer price index to analyze rate of increase of option pricing for roofing services was not unreasonable where there was no reason to suspect that roofing prices had either declined or increased at lower rate than prices generally, and the protester did not furnish any evidence demonstrating that roofing prices were substantially different from those of the option prices).

As a final matter, the protesters mistakenly rely on our decisions in Banknote Corp. of Am., Inc., B-250151, Dec. 14, 1992, 92-2 CPD para. 413 and AAA Eng'g & Drafting, Inc., B-236034, B-236034.2, Mar. 26, 1992, 92-1 CPD para. 307 as support for their argument that the agency's price analysis unreasonably failed to consider changes in the market. In both Banknote and AAA Eng'g & Drafting, we found the option exercise unreasonable because the agency's price analysis was limited to comparing the prices it had received for the option year under the original solicitation despite substantial increases in the agencies' requirements and/or significant decreases in market prices, suggesting that the agency could have anticipated substantially lower prices.

Specifically, in Banknote, the agency's needs exceeded the estimated quantities under the contract by more than 50 percent in the year prior to the agency's option exercise and by more than 16 percent, 2 months into the option year. There has been no similar showing in this case. Rather, the record suggests the agency's requirements are decreasing--the number of ship visits under MLS's contract has declined from the date of award to the beginning of option year 6--a fact suggesting that a new solicitation could result in higher prices.[11]

Similarly, in AAA Eng'g & Drafting, the agency exercised an option based on prices for 736 square feet of warehouse space; yet, the agency's requirements under the contract had grown to 8,820 square feet. Moreover, the protester in that case presented evidence that prices for similar warehouse space had decreased to less than half of that charged under

the option exercised by the agency. Again, the protesters have not made a similar showing or presented any evidence to suggest that MLS's option 6 prices are substantially higher than those paid in the current market.

We conclude that the Navy's determination under FAR sect. 17.207 that exercise of option 6 under MLS's contract was in the best interest of the government, price and other factors considered, was not unreasonable and was in accordance with applicable regulations. While the protesters ultimately disagree with the Navy's judgments in balancing its need for continuity of services, price, and the difficulties posed by a lengthy and complex acquisition planning process, their disagreement does not demonstrate that the Navy abused its discretion in deciding not to compete the option requirements at issue.

The protest is denied.

Anthony H. Gamboa

General Counsel

[1] The Navy entered into a novation agreement resulting in the transfer of the contract from MLS-Multinational Logistic Services, Ltd. to the intervenor, MLS, Limited. The intervenor represents that MLS, Limited has recently changed its name to that of the original contractor, MLS-Multinational Logistic Services, Ltd. The protesters argued in part that the Navy's decision to novate the contract was a nullity and contrary to law because MLS-Multinational Logistics Services, Ltd. had "expired" or "dissolved" by operation of Maltese law prior to the novation--MLS-Multinational Logistic Services, Ltd. had been a Maltese offshore company, according to the protesters. The protesters further argued that the exercise of the option to MLS, Limited constituted an improper sole-source award, as a consequence of the improper novation. In developing the case, our Office dismissed these issues because they turned on the propriety of the novation agreement--a matter of contract administration--which is not for GAO's review.

[2] The Navy requested dismissal of the protesters' challenge to the exercise of option 6 arguing that the decision to exercise an option is a matter of contract administration and therefore not for our review. See 4 C.F.R. sect. 21.5(a) (2005). While our Office views an agency's decision not to exercise an option as a matter of contract administration, we will entertain protests arguing that an agency unreasonably decided to exercise an option in an existing contract, rather than conduct a new procurement. See, e.g., Test Sys. Assocs., Inc., B-244007.6, Mar. 29, 1993, 93-1 CPD para. 274 at 4-5. As a consequence, we denied the agency request for summary dismissal in this regard.

[3] According to the protester, 14 Navy husbanding contractors (including Antmarin, Tzanakos, and Domar) joined in the purchase of MLS-Multinational Logistic Services, Ltd. to compete for the Mediterranean husbanding contract requirements. Principles from the three protesters, Antmarin, Tzanakos, and Domar, were elected to serve on the board of directors for MLS-Multinational Logistic Services, Ltd.. However, as described by the protesters, due to disagreements with other board members, they have been effectively excluded from the operations of MLS-Multinational Logistic Services, Ltd. and the successor contractor, MLS, Limited. Protest at 3, 7.

[4] The contract included Federal Acquisition Regulation (FAR) Clause 52.217-9, Option to Extend the Term of the Contract (Mar 1989), which states in relevant part:

(a) The Government may extend the term of the contract by written notice to the Contractor; provided that the Government shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

Contract at 13.

[5] The Navy noted that MLS's escalation from option year 5 to year 6 was 4.9 percent,

while the price escalation for the two other offerors considered by the agency was 4.4 percent and 4.7 percent. In addition, the Navy noted that the total escalation in pricing from the base year to option year 6 was 12.92 percent while the escalation of the two other offerors considered was 18.62 percent and 25.29 percent. While the protester contends that the Navy's analysis was flawed because it did not compare MLS's prices to all offerors' prices, the Navy explains that it only considered the price information for those offerors in the competitive range that had submitted price information on a sufficient number of ports to perform a meaningful comparison. Agency's Response to Protester's Comments at 7. The protesters do not provide any reason to suggest that the agency's judgment in this regard was unreasonable.

[6] The Navy defined countries most visited to mean those that comprised at least 5 percent of total visits and noted that these countries, when combined, constituted 89 percent of total visits: (1) Greece (33 percent); (2) Italy (26 percent); (3) Spain (13 percent); (4) France (12 percent); and (5) Turkey (5 percent).

[7] The Navy indicated that the acquisition planning process for soliciting and awarding regional husbanding contracts is complex and time-consuming. In developing the solicitation, the Navy obtains input from many agency customers, with at times conflicting requirements. Based on past experience, the Navy's regional husbanding contract for Northern Europe required 8 months to develop a statement of work and over a year to make an award from the date of issuance of the solicitation. In contracting for regional husbanding services in Southwest Asia, development of the statement of work required 6 months and award had not been made after 18 months. Developing the statement of work for the current contract required 8 months and after issuance of the solicitation award was made in approximately 9 months. AR at 3; Tab 5, Decl. of Officer in Charge of Navy Regional Contracting Detachment Naples, Italy, at 2.

[8] Exercise of an option satisfies the requirement for full and open competition, where the option was evaluated as part of the initial competition and it is exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. FAR sect. 17.207(f).

[9] The protesters also argue that the agency failed to properly consider overbilling by MLS during contract performance. Prior to filing their protest, the protesters had raised allegations of overcharging by MLS with the contracting officer. The Navy, however, explains that upon review of these allegations it appeared that they related to invoice reconciliation matters, which MLS had immediately and appropriately remedied after it was alerted as to these issues. See Agency Response to June 15, 2005 Conference Call.

[10] The protesters assert that when the Navy compared MLS's prices for trash and sewage services with those of the Navy's Gaeta contractor, the Navy used the wrong unit price information for MLS. Specifically, the protesters note that the Navy used a unit price of [deleted] euros rather than a higher rate of [deleted] euros. Protesters' Final Comments at 9 n.2. Even assuming this to be true, this small difference in price would not have altered the Navy's conclusion that MLS prices were approximately [deleted] percent less than those of the Navy's Gaeta contractor.

[11] According to the Navy, in fiscal year 1999, there were 628 visits, while in fiscal year 2004, there were only 355 visits. AR, Tab 6, Determination Not to Exercise Option Year Seven, at 3.